95-1695

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE PEOPLE OF THE STATE OF CALIFORNIA
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,,
Petitioner,

v.

BRET CRAIG BINDA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
FIFTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the Fourth Amendment tolerate a double standard for the search or seizure of an operable vehicle depending on whether the search or seizure is based on probable cause to believe the vehicle contains criminal evidence or probable cause to believe the vehicle is a forfeitable asset?

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	2
ARGUMENT	5
A SINGLE FOURTH AMENDMENT STANDARD MUST APPLY TO THE WARRANTLESS SEIZURE OF AN OPERABLE VEHICLE REGARDLESS OF WHETHER THE VEHICLE IS SEIZED TO SEARCH FOR CRIMINAL EVIDENCE OR AS A FORFEITABLE ASSET	5
INTRODUCTION	5
DISCUSSION	6
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
Cases	
Cady v. *Dombrowski* 413 U.S. 433 (1973)	12
California v. *Carney* 471 U.S. 386 (1985)	6, 7, 11, 12
California v. *Greenwood* 486 U.S. 325 (1988)	4
Carroll v. *United States* 267 U.S. 132 (1925)	11
Chambers v. *Maroney* 399 U.S. 42 (1970)	6, 11, 12
Davis v. *State* 813 P.2d 1178 (Utah 1991)	9
Florida v. *Meyers* 466 U.S. 380 (1984)	6
Fuqua v. *Armor* 543 S.W.2d 64 (Tenn. 1976)	9
G.M. Leasing Corp. v. *United States* 429 U.S. 338 (1977)	7
In Re 1972 Porsche 307 So.2d 451 (Fla.App.1975)	9

TABLE OF AUTHORITIES, CONT'D

In re Lance W.
37 Cal.3d 873 (1985) 4

Michigan v. *Thomas*
458 U.S. 259 (1982) 6

Murray's Lessee v. *Hoboken Land & Improv. Co.*
18 How 272, 15 L.Ed. 372 (1856) 7

O'Reilly v. United States
486 F.2d 208 (8th Cir. 1973) 8

One 1958 Plymouth Sedan v. *Pennsylvania*
380 U.S. 693 (1965) 7

One 1975 Pontiac LeMans
621 F.2d 444 (1st Cir. 1980) 8

People v. *Alvarado*
181 Cal.App.3d Supp. 1 (1986) 4

People v. *Franco*
183 Cal.App.3d 1089 (1986) 4

People v. *Neer*
177 Cal.App.3d 991 (1986) 4

State Conservation Dept. v. *Seaman*
396 Mich. 299, 240 N.W.2d 206 (1976) 9

State v. *Brickhouse*
890 P.2d 353 (Kan.App. 1995) 9

TABLE OF AUTHORITIES, CONT'D

State v. *McFadden*
63 Wash.App. 441, 820 P.2d 53 (1991) 9

State v. *Peacher*
167 W.V. 566, 280 S.E.2d 559 (1981) 9

Texas v. *White*
423 U.S. 67 (1975) 6

United States v. *$29,000--U.S. Currency*
745 F.2d 853 (4th Cir. 1984) 8

United States v. *Daccarett*
6 F.3d 37 (2d Cir. 1993) 9

United States v. *Francolino*
367 F.2d 1013 (2d Cir. 1966) 9

United States v. *Hamilton*
792 F.2d 837 (9th Cir. 1986) 6

United States v. *Hatley*
15 F.3d 856 (9th Cir. 1994) 6

United States v. *Karp*
508 F.2d 1222 (9th Cir. 1974) 9

United States v. *Lasanta*
978 F.2d 1300 (2d Cir. 1992) 9

United States v. *Linn*
880 F.2d 209 (9th Cir. 1989) 9

TABLE OF AUTHORITIES, CONT'D

United States v. *McCormick*
502 F.2d 281 (9th Cir. 1974) 4, 8

United States v. *One 1977 Lincoln Mark V Coupe*
643 F.2d 154 (3d Cir. 1984) 8

United States v. *One 1978 Mercedes Benz*
711 F.2d 1297 (5th Cir. 1983) 8

United States v. *One 1980 Red Ferrari*
875 F.2d 186 (8th Cir. 1989) 7

United States v. *Pace*
898 F.2d 1218 (7th Cir. 1990) 7, 8

United States v. *Ross*
456 U.S. 798 (1982) 6, 7, 10, 11, 13

United States v. *Seifuddin*
820 F.2d 1074 (9th Cir. 1987) 7

United States v. *Spetz*
721 F.2d 1457 (9th Cir. 1983) 9, 11

United States v. *Stout*
434 F.2d 1264 (10th Cir. 1970) 8

United States v. *Valdes*
876 F.2d 1554 (11th Cir. 1989) 8

TABLE OF AUTHORITIES, CONT'D

Constitutional Provisions

Fourth Amendment *passim*

Statutes

California Penal Code Sections
995 3
1538.5 3
11377 3
11379 3

United States Code
tit. 28, §1257, subd.(a) 2

Court Rules

Rules of the Supreme Court of the United States
rule 10 2

Other Authorities

3 Wayne R. LaFave, *Search and Seizure* (2d ed. 1987) 8

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ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,,

Petitioner,

v.

BRET CRAIG BINDA, *Respondent*.

OPINION OR JUDGMENT BELOW

Petitioner respectfully petitions for a writ of certiorari to review the order of the California Court of Appeal, Fifth Appellate District, affirming the trial court judgment of dismissal of criminal charges against Bret Craig Binda, defendant and respondent (hereinafter "defendant"), for transportation and possession of methamphetamine following defendant's successful motion to suppress evidence. (See Appendix, item 1.) The decision, which was unpublished, was designated case number F021529 by the Court of Appeal. Defendant was originally charged in information number 263845 of the Superior Court of Stanislaus County, California.

STATEMENT OF JURISDICTION

This Court has jurisdiction under section 1257, subdivision (a), of Title 28 of the United States Code and Rule 10 of the Rules of the Supreme Court of the United States.

The opinion by the Fifth Appellate District of the California Court of Appeal concerning which a writ of certiorari is sought by petitioner was filed on September 28, 1995. A modification of this opinion was filed on October 25, 1995.

The California Supreme Court denied a petition for review on December 21, 1995.

In a letter dated March 20, 1996, referencing Application No. A-781, Assistant Clerk Melissa A. Blalock informed petitioner that the Honorable Justice Sandra Day O'Connor had granted an extension of time within which to file a petition for a writ of certiorari in this matter to and including April 19, 1996.

CONSTITUTIONS, STATUTES OR REGULATIONS

The Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On December 21, 1992, officers of the Modesto, California, Police Department seized a van being driven on a public street by defendant because they had probable cause to believe the van was a forfeitable asset in that it was the fruit of narcotics transactions. The officers lacked a warrant. The sufficiency of the probable cause was not questioned at any stage of the

subsequent proceedings. Methamphetamine was found inside the van during an inventory search.

Defendant was charged with violation of California Penal Code sections 11377 and 11379, possession and transportation of methamphetamine respectively.

After a hearing, the trial court granted defendant's motion to suppress evidence (Cal. Pen. Code, § 1538.5) based on the claim that the van was improperly seized. Defendant's argument included the contention that the seizure violated the Fourth Amendment. See Appendix No. 1, slip opinion of Court of Appeal, p. 7, last 2 sentences. The trial court thereupon ordered the matter dismissed for insufficient evidence on March 3, 1994, pursuant to California Penal Code section 995.

Petitioner sought relief in an appeal filed with the California Court of Appeal, Fifth Appellate District. The constitutionality of the seizure was fully addressed by both parties in the briefing before the Court of Appeal.

In an unpublished opinion filed on September 28, 1995, the Court of Appeal denied the appeal and affirmed the judgment below. A modification was filed to the opinion on October 25, 1995, in response to the People's Petition for Rehearing.[1/]

The decision by the Court of Appeal addressed and was based upon the federal constitutional question; the court first rejected a theory proposed by petitioner to the effect that state law permitted the seizure, found that there were no exigent circumstances present when the van was stopped, and adopted the reasoning and

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1. The thrust of the modification was to delete all language pertaining to a possible alternate theory justifying suppression, namely that the asset forfeiture theory was a pretext masking an intent to search for criminal evidence.

holding of *United States* v. *McCormick*, 502 F.2d 281 (9th Cir. 1974).[2] The finding regarding the absence of exigent circumstances was based on evidence that the officers had been aware of the facts supporting probable cause for three months before the van was seized.

The California Supreme Court denied petitioner's Petition for Review on December 21, 1995. This petition follows.

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2. Under California law, motions to suppress evidence may only be based on a claim that the search and/or seizure violated the Federal Constitution. *In re Lance W.*, 37 Cal.3d 873, 882, 886-887 (1985). This Court has acknowledged this rule and implicitly approved its implications. *California* v. *Greenwood*, 486 U.S. 325, 337-338 (1988). The rule holds even where evidence has been seized by officers who act in excess of their authority and in violation of state law, so long as the defendant's rights under the Fourth Amendment of the federal Constitution are not violated. *People* v. *Franco*, 183 Cal.App.3d 1089, 1095 (1986); *People* v. *Alvarado*, 181 Cal.App.3d Supp. 1, 5 (1986); *People* v. *Neer*, 177 Cal.App.3d 991, 997-999 (1986).

California voters, in short, have rejected use of the exclusionary rule as a remedy for official "misconduct" unless compelled by the federal Constitution.

Thus the finding by the Court of Appeal that the officers' conduct was not authorized by state law may not be the basis of a suppression order; the only question is whether the officers' conduct violated the Fourth Amendment. The Court of Appeal properly, and necessarily, reached this question, but resolved it incorrectly.

It should be noted that this case does <u>not</u> involve the question of whether the state may lawfully take permanent possession of a vehicle seized in violation of state law, but only whether evidence found therein is admissible.

ARGUMENT

A SINGLE FOURTH AMENDMENT STANDARD MUST APPLY TO THE WARRANTLESS SEIZURE OF AN OPERABLE VEHICLE REGARDLESS OF WHETHER THE VEHICLE IS SEIZED TO SEARCH FOR CRIMINAL EVIDENCE OR AS A FORFEITABLE ASSET

INTRODUCTION

Where police have probable cause to search an operable motor vehicle for criminal evidence, no showing of exigency is required to justify a warrantless search. A split has emerged among the federal courts of appeals, however, over whether a specific showing of exigency is required before the warrant requirement will be excused where police have probable cause to seize the vehicle as a forfeitable asset.

Petitioner submits that this case presents in unusually pristine form the question of whether the federal Constitution is disturbed where officers, without exigent circumstances, make a warrantless seizure of an operable vehicle on probable cause to believe the vehicle is a forfeitable asset. While the Ninth and Second circuits have so held, eight others have taken a contrary position. State Courts are similarly divided.

Petitioner submits that this irreconcilable split has existed for more than 20 years, is ripe for resolution, and involves a fundamental question of constitutional doctrine which is compelling.

DISCUSSION

A series of cases by this Court has established that no showing of exigent circumstances need be made where officers search an operable vehicle without a warrant based on probable cause to believe that criminal evidence may be found in the vehicle. See, e.g., *California* v. *Carney*, 471 U.S. 386, 392 (1985) [motor home on public parking lot]; *Florida* v. *Meyers*, 466 U.S. 380, 381, 383 (1984) [impounded vehicle]; *Michigan* v. *Thomas*, 458 U.S. 259 (1982) [impounded vehicle]; *United States* v. *Ross*, 456 U.S. 798 (1982) [closed compartment of impounded vehicle]; *Texas* v. *White*, 423 U.S. 67 (1975) [impounded vehicle]; *Chambers* v. *Maroney*, 399 U.S. 42 (1970) [impounded vehicle]; these cases will be hereinafter referred to as the *Carney-Ross* line.

While the multiplicity of cases in this line demonstrates that this doctrine is well established, it also demonstrates that this Court has perceived an ongoing uncertainty about the application of the Fourth Amendment to warrantless searches and seizures of automobiles. The split among the circuits on the question presented by this petition demonstrates that that uncertainty is not yet completely resolved; petitioner submits that resolution by this Court is required.

The Ninth Circuit, like all circuits, has embraced the *Carney-Ross* doctrine. *United States* v. *Hatley*, 15 F.3d 856, 858-859 (9th Cir. 1994); *United States* v. *Hamilton*, 792 F.2d 837, 842-843 (9th Cir. 1986).

Where there is a seizure of a forfeitable asset, as distinguished from a seizure for purposes of a search for criminal evidence, this Court has held that Fourth Amendment protections and a probable cause test are

applicable. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965)[3]; see also *United States* v. *One 1980 Red Ferrari*, 875 F.2d 186, 188 (8th Cir. 1989); *United States* v. *Seifuddin*, 820 F.2d 1074, 1077 (9th Cir. 1987); see also *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 (1977); *Murray's Lessee* v. *Hoboken Land & Improv. Co.*, 18 How 272, 15 L.Ed. 372 (1856).

It would follow, therefore, that where the same constitutional protection is involved, the same standard of exigency (or lack thereof) should apply. Thus where there is to be a seizure of an operable vehicle as a forfeitable asset, no further showing of exigency need be made and the only question on review is the sufficiency of the probable cause to believe that the vehicle is actually subject to forfeiture.

However, notwithstanding the *Carney-Ross* line of cases, a split has arisen among the federal circuit courts as to the nature of the exigency which must be shown. The majority of the circuits have adopted the *Carney-Ross* test -- that the exigency requirement is satisfied once officers determine that the item to be seized for asset forfeiture purposes is an operable motor vehicle. The strongest recent case in this line is probably *United States* v. *Pace*, 898 F.2d 1218, 1241 (7th Cir. 1990). The Seventh Circuit has been joined by the First,

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3. The facts of *1958 Plymouth* somewhat parallel those of this petition. A low-riding vehicle suspected of containing unlicensed liquor was stopped by officers of the state Liquor Control Board acting on probable cause without a warrant. A proceeding was initiated to forfeit the car based on the discovery of the unlicensed liquor. The lower courts rejected the claim of the vehicle's owner that the exclusionary rule must be applied appropriate to evidence supporting probable cause. This Court held that the Fourth Amendment applied to the seizure and that the exclusionary rule could be applied, and remanded for consideration of the sufficiency of the probable cause.

Third, Fourth, Fifth, Eighth, Tenth, and Eleventh circuits, a total of eight circuits. Representative cases from those circuits, identified in numerical order of the circuits, are *One 1975 Pontiac LeMans*, 621 F.2d 444, 450 (1st Cir. 1980)[4], *United States* v. *One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 158 (3d Cir. 1984); *United States* v. *$29,000--U.S. Currency*, 745 F.2d 853, 856 (4th Cir. 1984); *United States* v. *One 1978 Mercedes Benz*, 711 F.2d 1297, 1302 (5th Cir. 1983); *O'Reilly v. United States*, 486 F.2d 208 (8th Cir. 1973); *United States* v. *Stout*, 434 F.2d 1264 (10th Cir. 1970); *United States* v. *Valdes*, 876 F.2d 1554, 1558-60 (11th Cir. 1989).[5]

"It is difficult to ignore this general acceptance," the *Pace* court noted. *United States* v. *Pace, supra,* 898 F.2d at p. 1242; see also 3 Wayne R. LaFave, *Search and Seizure*, § 7.3(b), at p. 83 (2d ed. 1987).

An alternate line has developed in the Ninth and Second Circuits, however, which imposes a higher standard of exigency -- not only must the People show that the item to be seized is an operable vehicle, but they must make some further showing of exigency to the effect that the vehicle is likely to disappear or be concealed if officers delay the seizure to obtain a warrant. The seminal case in this line is *United States* v. *McCormick*, 502 F.2d 281, 285-287 (9th Cir. 1974). *McCormick* was followed in order in the Ninth Circuit by

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4. The First Circuit's position may be clouded. See *U.S.* v. *Pace, supra,* 898 F.2d at p. 1241, fn. 10.

5. Petitioner is aware of no cases addressing this question in the Sixth, Seventh, or Ninth circuits.

United States v. *Karp*, 508 F.2d 1222 (9th Cir. 1974)[6]; *United States* v. *Spetz*, 721 F.2d 1457, 1471 (9th Cir. 1983); and *United States* v. *Linn*, 880 F.2d 209, 215 (9th Cir. 1989).

The Second Circuit joined the Ninth in the strident language of *United States* v. *Lasanta*, 978 F.2d 1300 (2d Cir. 1992), a case which fails to acknowledge that it departs from well-established precedent in that circuit. See *United States* v. *Francolino*, 367 F.2d 1013 (2d Cir. 1966). *Lasanta* was recently followed by *United States* v. *Daccarett*, 6 F.3d 37, 49 (2d Cir. 1993).

The same split may be found in the state courts. See generally the discussion in *State* v. *Brickhouse*, 890 P.2d 353, 360-364 (Kan.App. 1995). Some, like *Brickhouse*, are in accord with *Pace* and do not require exigent circumstances. See, e.g., *State* v. *McFadden*, 63 Wash.App. 441, 449, 820 P.2d 53 (1991). Others, by various avenues of reasoning, are in accord with *McCormick*. See, e.g., *Davis* v. *State*, 813 P.2d 1178, 1181-1184 (Utah 1991); *State* v. *Peacher*, 167 W.V. 566, 280 S.E.2d 559, 576-579 (1981) [exigent circumstances sufficient]; *Fuqua* v. *Armor*, 543 S.W.2d 64 (Tenn. 1976) [absence of exigent circumstances invalidated seizure]; *State Conservation Dept.* v. *Seaman*, 396 Mich. 299, 321, 240 N.W.2d 206, 213, 216 (1976) [same; moored fishing boat]; *In Re 1972 Porsche*, 307 So.2d 451 (Fla.App.1975) [seizure invalidated; exigent circumstances and probable cause both lacking].

There exists, therefore, a well-established split among the circuits and states on this question. Petitioner submits there is a compelling need for uniform

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6. *Karp* expressly acknowledged that the court has established a new rule departing from precedent in other circuits, identifying several cases with which it was in disagreement. *Id.*, at p. 1125.

application of fundamental constitutional doctrine in this area.

Petitioner submits that there can be only one Fourth Amendment standard for a search or seizure based on probable cause, and there can accordingly be only one standard for the showing of exigency required to excuse the general warrant requirement. It defies reason to hold that there can coexist two Fourth Amendment constitutional standards, one applicable to probable cause vehicle seizures and searches for criminal evidence and one applicable to probable cause seizures of a vehicle which is a forfeitable asset.

Nonetheless the two lines have gone their separate ways; when an opportunity came for them to join, in fact, the Ninth Circuit took a wrong turn, as demonstrated by this quotation from *United States* v. *Spetz, supra*, 721 F.2d 1457, written after *Ross* was filed:

> "Although automobiles are inherently mobile, '[t]he word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears.' *Coolidge* v. *New Hampshire*, 403 U.S. [443] at 471-62, 91 S.Ct. at 2035 [1971]. The existence of probable cause standing alone is not sufficient to justify a warrantless search or seizure of an automobile. A warrantless search or seizure is permissible only if probable cause exists *and* the facts or circumstances surrounding the particular search of an automobile are sufficient to bring that search within the automobile exception. It is an understatement to observe that the contours of the automobile exception are not clearly defined. [Footnote omitted.] In fact, we have previously noted the impossibility of reconciling the Supreme Court's decisions in this area. *United States* v. *McClain*, 531 F.2d 431, 433 (9th Cir., *cert. denied,*

> 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976)." *United States* v. *Spetz, supra,* 721 F.2d at p. 1471, emphasis in original.[7]

The reasons for this uncertainty by the Ninth Circuit appear to be historical. The emergence of the *Carney-Ross* line caused lower courts to reconsider their positions on searches of vehicles for criminal evidence. There had already been in place, however, a venerable line permitting forfeiture seizures of vehicles which began when the Supreme Court authorized the warrantless seizure of bootleggers' vehicles based on probable cause:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause . . . [to believe] that an automobile or other vehicle contains that which by law is subject to seizure and destruction [alcoholic beverages], the search and seizure are valid." *Carroll* v. *United States*, 267 U.S. 132, 149 (1925).

However, as noted in *California* v. *Carney, supra,* 471 U.S. at pp. 390-391, the mobility of an automobile was "clearly the basis of the holding in *Carroll*" and some subsequent cases supporting the automobile exception appeared to hold that if there were no specific exigent circumstances associated with the automobile a warrant may be required.

Thus, in *Chambers* v. *Maroney, supra,* 399 U.S. 42, this language may be found:

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7. In fairness to the authors of *Spetz,* others have acknowledged that automobile searches have been "a troubled area." See Concurring opinion by Blackmun, J., *United States* v. *Ross, supra,* 456 U.S. at p. 825.

> "Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstances the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in Carroll and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search. [footnote citing *Chimel* v. *California* 395 U.S. 752, 794 n. 9 (1969)]." (*Chambers* v. *Maroney, supra,* 399 U.S. at pp. 50-51.)[8]

It subsequently came to be recognized, however, that the automobile exception was supported not only by the mobility of a vehicle but the fact that one's expectation of privacy in a vehicle is "significantly less" than that in a home or office. *California* v. *Carney, supra,* 471 U.S. at p. 391, principally citing *South Dakota* v. *Opperman*, 428 U.S. 364, 367, and *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973).

As expressed by this Court:

> "In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of

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8. In *Chambers*, the court affirmed the warrantless search of a vehicle taken to the station house after its occupants had been arrested for robbery because a field search would have been "impractical." *Chambers* v. *Maroney, supra,* 399 U.S. at p. 52, n. 10.

> privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met." *California* v. *Carney, supra,* 471 U.S. at p. 391.

Thus the *Carney-Ross* line effectively extinguished the possibility that a warrant might be required before an operable vehicle could be subject to a probable cause search for criminal evidence.

Petitioner submits that this Court must do the same for the probable cause seizure of an operable vehicle which is a forfeitable asset.

CONCLUSION

An irreconcilable conflict exists among the federal courts of appeal and many state courts on an issue of fundamental constitutional law. Petitioner respectfully submits that this Court must resolve the conflict by holding that no showing of exigency is required where an operable vehicle is seized without a warrant on probable cause to believe that it is a forfeitable asset.

Dated: April 16, 1996.

Respectfully submitted,

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